Supreme Court, U.S.
FILED
FEB 11 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-684

In The

Supreme Court of the United States

October Term, 1988

STATE OF MAINE, COMMONWEALTH OF PENNSYLVANIA, STATE OF CONNECTICUT, STATE OF VERMONT, STATE OF NEW HAMPSHIRE, STATE OF NEW JERSEY, and RICHARD L. OTTINGER,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and LEE THOMAS, Administrator, CINCINNATI GAS & ELECTRIC COMPANY, et al., MONONGAHELA POWER COMPANY, NORTH AMERICAN COAL CORPORATION, et al., PEABODY HOLDING COMPANY, INC., et al., TENNESSEE VALLEY AUTHORITY,

Respondents.

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INTRODUCTION

Two significant arguments are presented in opposition to this Petition that were not presented to the Court below. First, the Federal Respondents dispute the petitioners' assertion that EPA has made the Clean Air Act's interstate air pollution provisions effectively meaningless, suggesting instead that those provisions are implemented through "an ongoing process" of SIP revisions. Second, Industry Respondents argue that EPA's disposition of the interstate petitions *does* constitute performance of the statutory duty claimed by the petitioners – to determine that the SIPs of upwind states comply with the interstate standard of § 110(a)(2)(E) – although not in so many words. Neither argument has merit.

1. EPA's Claim that the Interstate Pollution Provisions Are Implemented Whenever Air Quality Standards Are Adopted or Revised Is False.

The Government responds to the central legal assertion of the Petition – that EPA's construction of the Clean Air Act leaves the Act's interstate pollution control provisions virtually meaningless – by reciting three circumstances under which the Act's prohibition of excessive interstate pollution will be applied by EPA:

> EPA's review of various SIP revisions submitted by States is an ongoing process and under EPA's construction Section 110(a)(2)(E)'s prohibition on interstate air pollution has to be satisfied for the Agency to approve of each revision. In addition, whenever a new NAAQS is promulgated or an existing NAAQS is revised, EPA must ensure that all SIPs and revised SIPs submitted for its review conform to Section 110(a)(2), including paragraph (E)'s prohibition.

Brief of Federal Respondents, at 10-11. The first mechanism holds no promise for any but the most isolated, local cases of interstate pollution. As noted in the Petition at 12, EPA's determination that only *new* emissions need to be evaluated in the context of a SIP revision, rather than the combined effect of new and previously approved emissions, has been challenged and upheld in two Circuits.

The latter two means conceivably offer an opportunity to examine the cumulative effect of multiple emissions. But contrary to the Government's assertion, EPA has *not* required the States to demonstrate compliance with § 110(a)(2)(E) on any of three occasions since 1977 when the agency has adopted or revised a NAAQS. *See* 43 Fed. Reg. 46264 (Oct. 5, 1978) (new lead standard); 44 Fed. Reg. 8202 (Feb. 8, 1979) (revised ozone standards); and 52 Fed. Reg. 24672 (July 1, 1987) (revised particulate matter standards). The suggestion in the Government's brief of a gradual, but steady review by EPA of interstate pollution has no basis in the agency's own construction of the statute.

2. The Industry Respondents' Claim that Section 110(a)(2)(E) Compliance Has, *De Facto*, Been Found by EPA Highlights the Critical Deficiency in EPA's Application of Section 126.

The briefs of both groups of Industry Respondents oppose certiorari on the new theory that EPA has effectively already determined that SIPs of the upwind states *do* adequately *prevent* interstate pollution:

> [I]n the final analysis, EPA undertook precisely the inquiry that would have governed the review of the

> Midwestern SIPs for their conformity with § 110(a)(2)(E). * * * In these circumstances, even assuming *arguendo* that the § 126(b) petitions were sufficient to trigger review of the Midwestern state SIPs, EPA's failure to state *in haec verba* that those SIPs have adequate provisions to prevent violations of § 110(a)(2)(E) in the petitioning States was, at worst, harmless procedural error.

Brief of Respondents Cincinnati Gas and Electric Co., et al., at 14; *see also* Brief of Respondents Peabody Holding Company, Inc., et al., at 9-10. More extreme even than the position taken by EPA, which fails to implement § 110(a)(2)(E) but at least leaves the question of compliance unresolved, the Industry Respondents would put the issue to rest. But they do so only by standing § 110(a)(2) on its head. Rather than having the Administrator approve each SIP if he finds that it satisfies the statutory criteria, these Respondents obtain the same result if the Administrator merely finds that evidence submitted by downwind states in a remedial administrative proceeding is *insufficient* to prove the interstate criterion is *violated*.

This logical somersault lays bare the critical deficiency in EPA's application of § 126 to these petitions: its placement of the full burden of proof on the petitioning states to prove violations of § 110(a)(2)(E), even in the absence of any prior agency determination of compliance. Thus, contrary to Cincinnati Gas's footnote 21, the Administrator's allocation of the burden of proof is precisely the instrument by which the Act's provisions to control interstate pollution are eviscerated. Until the Administrator accepts the same oversight responsibility for interstate pollution that he exercises under § 110 for intrastate pollution, the interstate provisions of the Act will remain effectively meaningless.

CONCLUSION

For the foregoing reasons, and those stated in the Petition, certiorari should be granted in this case.

Respectfully submitted,

Dated: February 10, 1989

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